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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000123-MR

LOUISVILLE METRO POLICE
MERIT BOARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CI-000926

CRYSTAL MARLOWE AND
LOUISVILLE METRO POLICE
DEPARTMENT — APPELLEES

AND

NO. 2013-CA-000133-MR

LOUISVILLE METRO POLICE DEPARTMENT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CI-000926

CRYSTAL MARLOWE AND
LOUISVILLE METRO POLICE
MERIT BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: This consolidated appeal stems from the Jefferson Circuit Court's order denying the motion of the Louisville Metro Police Department ("Department") to intervene in Crystal Marlowe's appeal from the decision of the Louisville Metro Police Department Merit Board ("Board") which upheld the Chief of the Department's decision to terminate Marlowe's employment as a detective with the Department. The court's order also denied the Board's motion to join the Department as an indispensible party to the appeal. Both the Board and the Department appeal. For the reasons stated below, we believe the trial court erred by denying the Department's motion to intervene and reverse and remand on that basis.

In January 2011, the Chief of the Department sent Marlowe a letter notifying her of her termination from employment with the Department. The Chief's letter outlined multiple Standard Operating Procedures ("SOPs") and detailed specific incidents in which Marlowe was found to have violated the cited SOPs. Marlowe appealed her termination to the Board pursuant to KRS[1] 67C.323(1). The Board held a nine-day hearing and, at the conclusion of the hearing, retired to deliberate. By a vote of three in favor and one opposed, the Board found the Chief was

[1] Kentucky Revised Statutes.

justified in terminating Marlowe's employment. The Board adopted its final order upholding the Chief's decision in January 2012.

In February 2012, Marlowe filed a complaint with the Jefferson Circuit Court seeking review of the Board's decision, alleging the decision was arbitrary. The only defendant named in the circuit court action was the Board. The Board then filed a motion to join the Department as a party defendant pursuant to CR[2] 19.01, arguing that the court could not offer complete relief in the Department's absence. And the Department filed a motion to intervene pursuant to CR 24.01(b). Marlowe also asked the court to allow her to depose the Board members who participated in her case in order to inquire whether or not they held meaningful deliberations and to order the Board to produce the concurring opinion to its final order, which was tendered by former Board member Allison Grant, a sitting Board member at the time of Marlowe's hearing who participated and voted in Marlowe's case, but who resigned from the Board prior to the Board's adoption of its final order. In December 2012, the trial court entered an order denying both the Board's motion to join the Department as a defendant and the Department's motion to intervene. In the same order, the court granted Marlowe's request to depose the Board members and ordered the Board to produce Grant's concurring opinion. This appeal follows.

A trial court's order denying a motion to intervene as a matter of right pursuant to CR 24.01 is immediately appealable. *Carter v. Smith*, 170 S.W.3d 402,

[2] Kentucky Rules of Civil Procedure.

407 (Ky. 2004). Our standard for reviewing whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409. CR 24.01(1) states:

> Upon timely application anyone shall be permitted to intervene in an action . . . (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

This rule has been interpreted as establishing a four-part test requiring the party seeking to intervene to prove: (1) the motion was timely; (2) the party has an interest in the subject of the action; (3) the party's ability to protect his or her interest may be impaired or impeded; and (4) none of the existing parties can adequately represent his or her interest. *Carter*, 170 S.W.3d at 409-10. We believe the Department has satisfied each of these requirements and should have been permitted to intervene as a matter of right.

The issue here is not timeliness or whether the Department has an interest in the subject of the action that could be impeded; clearly, the Department will be affected if a terminated detective is ordered to be reinstated. Rather, the issue concerns the final prong - whether the Department's interests are adequately represented by the existing party to the action, the Board.

Marlowe argues that the Board adequately represents the interests of the Department in the appeal, citing in support KRS 67C.323(3)(a), which outlines the procedure for appellate review of disciplinary hearings as follows:

> Every action of a dismissal, suspension, or demotion made by the board shall be final, except that any person aggrieved may, within thirty (30) days after the action, appeal to the Circuit Court in which the board meets. The board shall be named respondent as the consolidated local government police force merit board, and service shall be had on the chairman of the board. Notice of the appeal shall be given to the chief or the officer if not already a party to the appeal as real parties in interest.

Marlowe contends that since the statute calls for naming the Board as respondent, the General Assembly intended for the Board to represent the interests of the Department in an appeal like the one before us, and no other party may be named a respondent to the action. We disagree. The plain language of this statute distinguishes between the Board and the Department as separate entities with separate interests.[3] The rationale for this distinction is apparent in the present case. Marlowe accuses the Board of failing to meaningfully deliberate - the Board's interest in protecting the confidentiality of its deliberations could potentially conflict with the Department's interests, including managing its personnel. Further, if the General Assembly intended for the Board to be the only permissible party to an appeal to the circuit court, it could have employed specific language to that effect.

Lastly, from a common sense standpoint, it defies logic to eliminate the Department as a party in interest on appeal. If the Department's decision to

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[3] The Department points out that KRS 67C.323(3)(a) was amended on June 24, 2013, during the pendency of this appeal, adding the sentence, "Notice of the appeal shall be given to the chief or the officer if not already a party to the appeal as real parties in interest." We agree that this sentence was added to clarify that the Department is a real party in interest, distinct from the Board, in such an appeal.

terminate Marlowe had not been upheld by the Board and the Department appealed, no doubt exists that Marlowe would be deemed an indispensable party to that appeal. The same principle applies to the Department; the Department was a party to the disciplinary hearing below, which was conducted before an impartial administrative body, the Board. The Board in no way acts in a representative capacity for the Department in an appeal to the circuit court, and the trial court erred by denying the Department's motion to intervene as a matter of right. Based on this holding, we need not address the court's decision to deny the Board's motion to join the Department as a party defendant.

The Board raises two additional claims of error in the court's order, concerning whether Marlowe should be allowed to depose the Board members who participated in her case and whether the Board must produce a concurring opinion which, for whatever reason, was designated in the Board's final order as being adopted and attached thereto, but in fact was not attached. However, both of these claims of error are interlocutory in character and are not immediately appealable.

CR 54.01 states: "A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of the parties in an action or proceeding, or a judgment made final under Rule 54.02." While "CR 54.02 permits in certain circumstances for an appeal in a multi-claim action from a partial judgment disposing of less than all the claims, that rule requires that the partial judgment recite both that the judgment is 'final' and that 'there is no just reason for delay.'"

Spencer v. Estate of Spencer, 313 S.W.3d 534, 540 (Ky. 2010) (citation omitted). Absent such finality language, the rule is not invoked. *Id.*

In this case, the trial court's order did not contain the requisite finality language and all the rights and claims of the parties were not adjudicated by the court's order. Hence, the court's decision to order the Board to produce the concurring opinion and to allow Marlowe to depose the Board members was not final and is not ripe for appeal.

For the foregoing reasons, the Jefferson Circuit Court's order is reversed and this case is remanded to that court with instructions to permit the Department to intervene as a matter of right.

ALL CONCUR.

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